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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 600

FLORIDA DEHYDRATION COMPANY, *Petitioner*

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Claims

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 10-15) is reported at 101 F. Supp. 361.

JURISDICTION

The judgment of the Court of Claims was entered on December 4, 1951 (R. 15). The petition for a writ of certiorari was filed on February 20, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether, after failing even to suggest, by opposing affidavits or otherwise, in its response to respondent's motion for summary judgment that a genuine issue as to a material fact did exist, petitioner can now contend that such an issue does exist and that it was error for the Court of Claims to grant the motion.

RULES OF THE COURT OF CLAIMS INVOLVED

The Rules of the Court of Claims provide in pertinent part as follows:

> 15(b). Affirmative Defenses: In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, duress, estoppel, failure of consideration, fraud, illegality, laches, license, payment, release, res judicata, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. * * *
>
> 16(b). How Presented: Every defense in law or fact, to a claim for relief in any pleading, whether a petition, counterclaim, or third-party petition, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction of the subject matter or the person, and (2) failure to state a claim upon which relief can be granted. * * *

16(h). Waiver of Defenses: A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply * * * except (2) that, whenever it appears by suggestion of the parties or otherwise that the Court lacks jurisdiction of the subject matter, the Court shall dismiss the action.

51(c). Motion and Proceedings Thereon: After a motion for summary judgment has been filed and served as provided in Rules 3 and 7 and after expiration of the time allowed by Rule 7(b) for filing a response thereto, such motion shall be assigned to the calendar, as provided in Rule 47(b). The judgment sought shall be rendered if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. * * *

STATEMENT

On September 29, 1948, petitioner instituted the present suit in the Court of Claims for equitable relief under the Lucas Act (Act of August 7, 1946, 60 Stat. 902). In its petition, petitioner alleged that during the years 1943, 1944, and 1945, it entered into a series of contracts with respondent, through the War Foods Administration and the

Department of Agriculture, for the furnishing of various dehydrated vegetables, and that, in the performance of those contracts, it suffered a total loss of $260,846.20 through no fault of its own (R. 1-4). Petitioner further alleged that, on February 3, 1947, it filed a claim with the Department of Agriculture under the Lucas Act (R. 4), and that, on March 5, 1947, the Department of Agriculture mailed a letter to petitioner's attorney advising him that the claim could not be considered (R. 4). The letter stated that "any claim for losses incurred under these contracts cannot be considered under Public Law 657 [Lucas Act] because of failure to comply with Section 204 of Executive Order 9786, either for the reason that a written request for relief was not filed on or before August 14, 1945, or that final action with respect thereto was taken on or before that date." (R. 9).[1]

In answer to these allegations, respondent filed a general traverse (R. 9). Subsequently, a pretrial conference was held before a Commissioner and documentary evidence was received (R. 17-19). One of those documents is a letter, dated March 31, 1947, from petitioner's attorney to the

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[1] Section 204 of Executive Order 9786 (11 F.R. 11553, 3 CFR Supp. 1946, p. 165) provides that "No claim for loss under any contract or subcontract of a war agency shall be received or considered unless a written request for relief with respect thereto was filed with such war agency on or before August 14, 1945; and no claim shall be considered if final action with respect thereto was taken on or before that date." See *Fogarty* v. *United States*, 340 U.S. 8.

Secretary of Agriculture acknowledging receipt of the denial of petitioner's claim and requesting a conference (R. 19). At the bottom of this letter are two notations made by someone in the Department of Agriculture. One notation is to the effect that petitioner's attorney had called the Department on April 7, 1947, and would call back the following week to discuss the claim. The second notation is that on April 5, 1948, a year later, petitioner's attorney had called and would call back and arrange a conference. (R. 12-13.)

On the basis of the petition and the documents introduced into evidence, respondent moved for summary judgment (R. 9-10). In support of its motion, respondent urged (1) that the letters referred to in paragraph VIII of the petition (R. 5) did not constitute requests for relief within the meaning of the Lucas Act prior to August 14, 1945, and (2) that petitioner's claim was barred by the six months' period of limitation provided for in Section 6 of the Lucas Act.[2] Petitioner filed no

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[2] Section 6 of the Lucas Act (Act of August 7, 1946, 60 Stat. 902), as amended by Section 37 of the Act of June 25, 1948, 62 Stat. 869, 992, provides in pertinent part as follows: "Whenever any claimant under this Act is dissatisfied with the action of a department or agency of the Government in either granting or denying his claim, such claimant shall have the right within six months to file a petition with the Court of Claims, or, if the claim does not exceed $10,000 in amount or suit has heretofore been brought or is brought within thirty days after the enactment of this amendatory act, with any Federal district court of competent jurisdiction, asking a determination by the court of the equities involved in such claim * * *."

opposing affidavits and made no suggestion in its response to the motion that there existed any genuine issue as to any material fact. In its response, petitioner argued only (1) that its letters to the Department of Agriculture prior to August 14, 1945, did constitute written requests for relief within the meaning of the Lucas Act, and (2) that the letter of March 5, 1947, from the Department of Agriculture to petitioner's attorney did not finally dispose of petitioner's claim because the two notations on the letter of March 31, 1947, demonstrate that the claim was still pending and was being considered within the six months preceding the date of the filing of suit.

On these admitted facts, the Court of Claims held that petitioner's claim was formally denied on March 5, 1947, was not the subject of subsequent formal negotiations, and is, therefore, barred by the six months' period of limitation provided for in Section 6 of the Lucas Act. The court accordingly did not reach the question whether petitioner had filed requests for relief under the Lucas Act with the Department of Agriculture prior to August 14, 1945.

ARGUMENT

Petitioner apparently concedes that, on the facts before this Court, the Court of Claims correctly held that petitioner's claim is barred by the six months' period of limitation provided for in Section 6 of the Lucas Act (*supra,* p. 5, n. 2).

Petitioner now contends, however, that to have made that determination on motion for summary judgment on the basis of the present record was to deny petitioner procedural due process, allegedly because no issue as to the statute of limitations was raised by the pleadings and petitioner was consequently not afforded an opportunity to plead and present facts to defeat that defense, *i.e.*, evidence to explain the notations on the letter of March 31, 1947 (*supra*, p. 5) (Pet. pp. 4, 7). Neither contention, we submit, has any validity.

Both facets of petitioner's argument rest upon the proposition that the Rules of the Court of Claims permit the defense of limitations to be raised only by answer. In support of its position, petitioner points to Rule 15(b) which states that "In pleading to a preceding pleading, a party shall set forth affirmatively * * * statute of limitations * * * and any other matter constituting an avoidance or affirmative defense."[3] But petitioner overlooks Rule 16(b) which provides that the de-

[3] It should be pointed out that, at the time respondent filed its general traverse (R. 9), the court's Rules did not provide that a party shall set forth affirmatively any matter constituting an avoidance or affirmative defense. At that time (November 8, 1948), Rule 19 stated only that "The defendant shall file a printed demurrer, plea, or answer within 40 days after the filing of any petition, unless the court, for cause shown, extends the time." See 11A U.S. Sup. Ct. Digest (1949 ed.) p. 435. The present Rule 15 was promulgated on May 15, 1951, more than two years after the general traverse was filed.

fense of "lack of jurisdiction of the subject matter or the person" "may at the option of the pleader be made by motion," and Rule 16(h) which provides with respect to waiver of defenses that "whenever it appears by suggestion of the parties or otherwise that the Court lacks jurisdiction of the subject matter, the court shall dismiss the action." Since statutes of limitations relating to claims of which the Court of Claims may take cognizance are not merely procedural but are also jurisdictional in nature,[4] respondent plainly did not waive that defense by raising it for the first time on motion for summary judgment. Indeed, as this Court announced in *Finn* v. *United States*, 123 U.S. 227, 232-233, "The general rule that limitation does not operate by its own force as a bar, but is a defence, and that the party making such a defence must plead the statute if he wishes the benefit of its provisions, has no application to suits in the Court of Claims against the United States. An individual may waive such a defence, either expressly or by failing to plead the statute; but the Government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon suits against the United States in the Court of Claims."

In any event, it cannot properly be contended

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[4] *Finn* v. *United States*, 123 U.S. 227; *United States* v. *Wardwell*, 172 U.S. 48, 52; *Munro* v. *United States*, 303 U.S. 36, 41.

that petitioner was prejudiced by the fact that the question of limitations was first raised on motion for summary judgment. If, as petitioner now suggests, there was a genuine issue as to any material fact, petitioner could have responded to the motion and shown by opposing affidavits that such an issue of fact existed. Although petitioner was afforded the opportunity to do so under Rule 51(c), it did not make such a showing before the court below, but argued only that, on the pleadings and documents in evidence, its claim had been timely filed as a matter of law. In the circumstances, petitioner can scarcely be heard now to complain that it was deprived of any opportunity to present the pertinent facts and that a genuine issue of material fact does exist.

CONCLUSION

The decision below is correct, and there is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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